

Chapter IV

PROCUREMENT

General Requirements

This chapter provides guidelines for purchasing and contracting for supplies, equipment, construction, and other services acquired in whole or in part with HOME funds. Any subcontractor, person, private nonprofit agency, or other private entity providing services, or supplies or equipment to a HOME contractor or their authorized subcontractor must be selected in accordance with the requirements of 24 CFR 92.356, 24 CFR Part 84.40 through 84.48, and 24 CFR Part 85.36.

- State Recipients are subject to the procurement provisions of 24 CFR 92.356 and 24 CFR Part 85.36;
- Community Housing Development Organizations (CHDOs), who act as subrecipients or subcontractors to State Recipients, are subject to the procurement provisions of 24 CFR Part 92.356 and 24 CFR Part 84.40 – 84.48;
- CHDOs that act as owners or developers of HOME-assisted housing, within the 15% set-aside for CHDOs, are not subject to the federal procurement requirements contained in 24 CFR Part 84.40 and 24 CFR Part 85.36. However, CHDOs are required to have written procurement procedures that are in compliance with the conflict of interest requirements of 24 CFR 92.356 and the Minority Business Enterprise/Women's Business Enterprise (MBE/WBE) requirements of 24 CFR 92.350(a)(5).

HOME contractors may use their own procurement procedures provided they are consistent with the regulations and procedures described in this chapter, the Standard Agreement, and the applicable referenced federal and State statutes and regulations. This manual provides additional information on affirmative action procedures for contracting, and additional information regarding compliance with federal and State labor standards.

Conflict of Interest Requirements

All contractors must adhere to the conflict of interest provisions in 92.356, as well as those in 85.36(b)(3) and 84.42. Subcontractors who are hired either by a State Recipient or a CHDO to perform specific administrative tasks and/or administer the HOME program (administrative subcontractors) cannot be the developers and/or owners of projects in which HOME funds are used, unless HUD approves prior authorization. Exceptions to this prohibition are described in 92.356.

Likewise, any person or entity (including family or business ties) exercising any function in connection with the HOME funds cannot have a financial interest in any contract, subcontract, or agreement related to the HOME-assisted activity, during their tenure or for one year thereafter.

The intent of the above-cited regulations and the State HOME guidelines is to assure that:

1. Unnecessary or duplicative purchases are not made;
2. Favorable prices for goods and services are obtained without sacrificing needed quality;
3. Purchases are made on the basis of maximum open and free competition whenever possible;
4. National goals for equal employment opportunity, stimulation of small and minority-owned businesses, women's business enterprises and fair labor standards are encouraged.

To achieve the above objectives, HOME contractors and subcontractors should adhere to the following:

1. Contractors and subcontractors must perform a cost or price analysis for every procurement action, including contract modifications. This cost estimate must be in writing and must be prepared before bids or proposals are received. These estimates must be kept with the contractor's or subcontractor's procurement files;
2. Establish a written code of standards of conduct or ethics for employees responsible for procurement. This code should specify standards of behavior and sanctions for violations of those standards;
3. Establish written procedures to assure that unnecessary, duplicative or ineligible purchases are not made;
4. Establish a competitive bidding procedure for all purchases of goods and services to be followed whenever possible. Competitive bidding can be fostered in the following ways:
 - Invite all qualified firms in the area to bid on specific purchases;
 - Use clear and accurate descriptions of items or services to be purchased in the invitations to bid. Avoid specific brand requirements, although brand names may be used as an example of functional or quality requirements;
 - All purchases of more than \$100,000 are to be formally advertised through an appropriate public medium such as local or regional newspapers.
5. Make efforts to attract small and minority-owned businesses and women's business enterprises in an area where there is a surplus of labor to bid on goods and services purchased with HOME funds;
6. Select the most advantageous, responsible offer to obtain required supplies, equipment, construction, and services based not only on the bid price, but also on the integrity, resources, capacity, and past performance record of the firm or person making the bid;

7. Maintain complete files of all procurements and contracts to demonstrate compliance with the above requirements;
8. Maintain a system for contract administration to ensure contractor conformance with terms, conditions and specifications of the contract, and to ensure adequate and timely follow-up of all purchases.

Full and Open Competition Requirements

Federal procurement regulations require contractors to conduct procurement in a manner providing full and open competition. Following are examples of restrictions that are not permitted:

1. Placing unreasonable requirements on firms in order for them to qualify to do business;
2. Requiring unnecessary experience and excessive bonding;
3. Noncompetitive pricing practices between firms or between affiliated companies;
4. Noncompetitive awards to consultants that are on retainer contracts;
5. Organizational conflicts of interest;
6. Specifying only a brand name product;
7. Any arbitrary action in the procurement process.

Although these regulations exclude open-ended contracts, it is possible to issue a Request for Proposals (RFP) that would allow for a multi-year contract. To ensure that open and free competition will continue, it is the policy of HUD and the Department that multi-year contracts not exceed a three-year term.

RFPs must be task specific. As noted above, retainer-type contracts are not allowed. This means that an RFP issued to award a contract to carry out a HOME activity cannot be used to award additional contracts for subsequent HOME-funded activities.

Procurement Requirements

To ensure full and open competition, four methods of procurement are allowable using HOME funds: competitive sealed bids, small purchases, competitive proposals, and noncompetitive negotiation.

Procurement Requirement for State Recipients using an Administrative Subcontractor

State Recipients which use HOME funds for an Administrative Subcontractors must follow a competitive Request for Proposal (RFP)/Request for Qualification (RFQ) procurement process to select an Administrative Subcontractor. The key elements of this process are as follows:

- Solicitation by mail to at least three active administrative subcontractors in either the CDBG or HOME programs.
- Include in the RFP/RFQ a summary of the duties to be performed and the methodology for making a selection. If price is not a factor, specify how much funding is available for the contract.
- Allow a minimum of three weeks between the mailing date the final filing date for the proposal responses. Allow a minimum of two weeks if your RFP/RFQ is faxed or E-mailed.
- If only one bid is received, advance State approval must be obtained.

The method of procuring small purchases, however, may not be used for the procurement of the HOME paid administrative subcontractor. The competitive proposal method described in this chapter must be used for procuring the services of an administrative subcontractor.

State Recipients are not required to go through the procurement process prior to naming an administrative subcontractor in the NOFA application. It is recommended, however, that the RFP/RFQ process be followed prior to identifying the administrative subcontractor in the NOFA application. If the procurement process is followed after the NOFA application is awarded, but an administrative subcontractor other than the one identified in the NOFA application is selected then State approval must be obtained prior to awarding the contract.

Unless specifically waived in writing by the State, prior to Project Set-up the following items of documentation showing that the State Recipient has complied with applicable federal, state, and local procurement requirements for selection of the administrative subcontractor or any consultant paid with HOME funds:

- The Request for Proposal (RFP) or Request for Qualifications (RFQ), including selection criteria;
- The solicitation list;
- The list of bidders; and,
- An explanation of why selected bidder was chosen.

Federal procurement regulations require procurement in a manner providing full and open competition. State Recipients must follow 24CFR 92.356 and 24 CFR 5.36. It is imperative that the procurement process avoids noncompetitive pricing practices, noncompetitive retainers, or any arbitrary action in the procurement process.

Competitive Sealed Bids (Formal Advertising)

This is HUD's preferred method for all procurement transactions, and should be followed for new construction projects and multi-unit rehabilitation projects. This chapter contains important information regarding possible exceptions to the use of the sealed bid process for construction contracts. Sealed bids are solicited through formal advertising. A firm, fixed-price contract is awarded to the responsible bidder whose bid conforms to all the material terms and conditions of the bid invitation and is the lowest in price. The contract awarded may be a lump sum or a unit price.

In order for sealed bidding to be feasible, the following conditions must be met:

- Contractors must provide a complete, adequate and realistic specification or description of purchase to all prospective bidders;
- Two or more responsible vendors must be willing and able to effectively compete for the Contractor's business; and
- The procurement must lend itself to a firm, fixed-price contract that allows the contractor to select the successful bidder based principally on price.

When sealed bids are used, the following requirements apply:

- Contractors must solicit bids from a sufficient number of qualified vendors prior to the date of the bid openings;
- Contractors must formally advertise in newspapers of general circulation, including minority newspapers. Such advertisements should clearly define the items or services so that the bidders can properly respond to the invitation;
- Contractors must open all bids publicly at the time and place stated in the invitation;
- Contractors must reject any and all bids when sound, documented reasons support such a decision.

Small Purchase Method

Federal regulations allow Contractors to use the small purchase method for procurements costing in the aggregate of not more than \$100,000. This method is applicable for the procurement of services, supplies, or other property. These procedures are relatively simple and informal and do not typically involve competitive bidding. Price or rate quotations should be obtained from a sufficient number of qualified vendors. If the Contractor's jurisdictional limit is less than \$100,000, any limitations or restrictions in the Contractor's own procurement provisions are to be used. Purchasing Procedures 1-4 (in Appendix IV-A) may be used to implement a small purchase procurement system.

Competitive Proposals Method

Competitive proposal procedures may only be used when price is not used as a selection factor (e.g.,

procurement of architectural/engineering and administrative subcontractor services). By this method, competitors' qualifications are evaluated and the most qualified one is selected, subject to negotiation of fair and reasonable compensation.

Contractors may use competitive proposals if the conditions for the use of sealed bids do not exist. Under this process, an RFP is publicized and proposals are requested from a number of qualified vendors. A fixed-price or cost reimbursement contract is awarded. If the competitive proposal process is used, the Contractor must take the following steps:

- Solicit proposals from a sufficient number of qualified vendors to permit reasonable competition;
- Identify all significant evaluation factors in the RFP. Factors that should be included are as follows: Statement of the problem; how the consultant intends to address the problem; a breakdown of tasks that details scope of work and cost; a statement of qualifications, including references; a description of the applicant's organization; a cost proposal with an explanation of proposed billing and payment terms; and a proposed schedule of work;
- Describe the mechanisms for technical evaluation of the proposals received, determinations of responsible vendors for the purpose of written or oral discussions, and selection for contract award. If the RFP is complete, the factors contained in the RFP will serve as evaluation criteria;
- Select a responsible bidder whose proposal will be the most advantageous, considering price and other factors such as past record of performance. Unsuccessful bidders should be notified promptly.

Noncompetitive Negotiation (Sole Source) Method

Noncompetitive negotiation is allowed under certain conditions. This method may be used **only** when the award of a contract is infeasible under small purchase, sealed bids or competitive proposals **and** one of the following circumstances applies:

- The item desired is available from only one source;
- After multiple sources have been solicited, competition is determined inadequate;
- The awarding agency (in this case, the Department) authorizes noncompetitive proposals;
- The goods or services are needed rapidly to meet a public emergency.

If only one proposal has been received pursuant to any procurement process, or if the State Recipient wishes to select a specific contractor without a procurement process, written Department approval is required prior to contract award:

- For all contracts for an Administrative Subcontractor, or
- For all other contracts where the aggregate expenditure is expected to exceed \$100,000 (note: although advance approval is not required for contracts at or under \$100,000. The State Recipient must still conduct an acceptable procurement process per the requirements of this chapter.) This is especially critical if the Contractor or subcontractor believes the most competitive cost can be achieved only through a noncompetitive negotiation process.

When a Contractor proposes to use the noncompetitive negotiation method to delegate the administration of the local HOME Program or any portion thereof to a public body, such as a special district, redevelopment agency, housing authority or community development commission, the Department will generally approve this, provided that there is a memorandum of understanding or contract between the Contractor and the public body which delineates the division of contract management responsibilities and provides, at a minimum, that:

1. The public body is responsible to the contractor for complying with all provisions of the Standard Agreement that are delegated to the public body;
2. The Contractor is responsible for monitoring the public body for conformity with the Standard Agreement provisions;
3. The public body will comply with the provisions in OMB Circular A-87 (Circular A-122, if non-profit) regarding charges for services and will charge the Contractor for actual costs rather than fixed fees.

If a Contractor proposes to use the noncompetitive negotiation method to contract with an entity other than one of the public bodies mentioned above, the Contractor must discuss the following points in its request for authorization from the State HOME Program:

1. How the proposed sole source procurement process complies with the jurisdiction's procurement standards;
2. How the proposed sole source procurement process complies with the written Code of Standards for Conduct or Ethics established for the Contractor's employees responsible for procurement;
3. The process used to determine that there are no other qualified and interested entities that would provide the service for which the jurisdiction is contracting;
4. The expertise and record of success of the service provider in the area of service for which it is being considered;
5. The leveraging of other funds, services, materials, property or cost efficiencies which may accrue to the jurisdiction as a result of contracting with the proposed service provider;
6. The extent to which the service provider meets program objectives regarding use of small, MBE/WBE and local businesses.

The Contractor must document and retain a record of the rationale used to select this procurement method and provide an explanation of how the cost of the service or product was determined to be reasonable.

Procedures for Purchasing

The procedures outlined in this chapter can be used selectively to improve existing procedures or in total to implement a complete system. Contractors who have questions concerning whether or not their purchasing procedures and systems meet State and federal requirements should contact their HOME representative for clarification and assistance.

Adopt a Purchasing Ordinance

A legal basis establishing formal purchasing and procurement standards should be established by State Recipients in the form of a local purchasing ordinance, or for CHDOs, by adopting a procurement policy. The ordinance or policy should establish the objectives for the procurement process, standards of conduct for personnel involved in the purchasing process, and penalties for violations of those standards. The contractor should then implement the ordinance or policy by developing a formal purchasing manual describing the procedures to be employed in the purchasing process.

Organization

The contractor should designate a single individual as the purchasing officer. All HOME purchase requests should be submitted to this person for review and coordination. This individual should be responsible for conditioning all contracts with vendors and construction contractors to ensure compliance with procurement requirements.

The contractor's program manager should establish communication with the purchasing officer and other officials responsible for procurements. For example, if the program manager is the planning director, that person typically relies on the city engineer, building inspector, public works director, legal counsel, and/or the finance director to assist in initiating, organizing, and monitoring the procurement process. This process includes the following functions:

1. Establishing the need for procurement of supplies, equipment, construction, or service based on the program plan;
2. Assigning appropriate persons to prepare specifications, manage solicitations, and negotiate contract terms. Desirable skills of these persons might include the following:
 - Architectural
 - Engineering
 - Construction
 - Legal
 - Accounting

3. Monitoring solicitation of bids including the following:
 - Preparation of bids and specifications
 - Advertising
 - Receipt of bids
 - Evaluation of bids
4. Participating in final selection of contractors.
5. Overseeing preconstruction activities and negotiations.
6. Signing contracts.

Advance Approval Requirements

It is not possible to describe in this Manual all the equipment, supplies, or other services that require advance approval prior to purchase. In particular, Contractors should consult 24 CFR 84.34 and 84.35, and 24 CFR 85.32 and 85.33, which potentially apply to their specific needs and situation. In addition, federal OMB Circular A-87, Attachment B, applies to local government recipients and any governmental subrecipient receiving HOME funds. OMB Circular 122 is for non-profit organizations. Copies of OMB Circulars may be obtained from E.O.P. Publications, Room 2200, New Executive Office Building, Washington, D.C. 20503; (202) 395-7332.

Procurement of Construction Services

Construction procurement requirements are generally more complex than the process for small purchases, and therefore the solicitation and procurement process is more elaborate. Please consult Purchasing Procedure 10 (in Appendix IV-A) for step-by-step guidance.

Because of the requirements imposed by federal and State agencies, it is imperative that Contractors review the ability of construction contractors to control and account for HOME funds, property, and other assets.

In most instances, construction procurements should follow the competitive sealed bids method. To facilitate competitive bidding, a list of prospective construction contractors for each type of activity should be assembled. The list should include firms or persons who have a good performance record and should include MBE/WBEs. Prospective construction contractors from each category should be invited to bid. Potential bidders cannot be precluded from qualifying during the solicitation period.

If you anticipate using a process other than the sealed bid process for a new construction project or a multi-unit (more than four units) rehabilitation project, consult with your State HOME representative prior to initiating that process.

Owner-Occupied Rehabilitation Programs

HUD Region IX office has informed the State HOME staff that the competitive sealed bid process does not have to be followed for individual loans for an owner-occupied rehabilitation program

because the construction contract amounts are relatively small. A State Recipient or their administering subcontractor does not have to require an owner to obtain more than one bid for the proposed work. All guidelines and rules must be in writing and available to the public. The State Recipient must always prepare its own cost estimate for the work. This cost estimate should involve a trip to the site and be complete in every respect; it cannot simply be a commentary on a construction contractor's bid.

In order for the State Recipient to allow an owner to move forward on a bid and actually contract with a construction contractor, that contractor's bid must be within 10 to 15 percent of the city's or county's own cost estimate; if it is more than 15 percent, further negotiation should be attempted to bring the cost estimates closer. Otherwise, it does not meet the "reasonable" cost criterion. (The State Recipient should give owners the specifications that they are following to make their own cost estimates, so that all proposed cost estimates, including the State Recipient's, will be based on the same quality specifications.)

The State Recipient must allow the owner to solicit bids from construction contractors that are not on the State Recipient's approved list of contractors. This encourages competitive bidding and discourages collusion. However, if the State Recipient has had prior difficulties with a construction contractor--significant difficulties that they can fully document or if the contractor's name appears on the debarred list--they can forbid the owner to contract with that contractor.

Additional Resources

To verify if the proposed construction contractor is on the HUD Debarred List, titled the List of Parties Excluded from Federal Procurement and Non-procurement Programs, check the website address <http://www.arnet.gov:8000/epl/owa/epl> search.name srch.

To verify if the proposed contractor is an active, State licensed contractor check the website address <http://www2.cslb.ca.gov>.

In-house Capability

Another exception to the required use of a competitive sealed bid process may occur in instances when a State Recipient or a CHDO has qualified in-house capacity to perform construction work. HUD Region IX has informed the State HOME staff that in cases where a city or county or CHDO has the capacity in-house to perform all or some work, such as construction, architectural, rehabilitation, cost estimating, or acting as general contractor, they can provide the Department with a cost estimate, based on architectural drawings and plans and specifications prepared by licensed persons. The Department's staff will review the estimate to determine if it is reasonable and eligible.

The city or county or CHDO must still have written procedures in place indicating how they determine project costs, and this information must be provided to the Department upon submittal of their cost estimate.

When a construction contract or subcontract exceeds \$100,000, construction contractors should be required to post bid guarantees at the time a proposal is submitted and a performance bond when the contract is awarded. Minimum requirements are as follows:

- The bid guarantee must equal 5 percent of the proposed contract amount and may be secured through a bid bond or a certified check;
- A performance bond for 100 percent of the contract amount must be posted;
- A payment bond must be posted for 100 percent of the contract price.

If the contract is less than \$100,000 in value, the Contractor shall follow its own requirements relating to bid guarantees, performance bonds, and payment bonds.

Architectural/Engineering Consultant Services

The Contractor should solicit qualification statements using area newspapers, professional publications, and direct solicitation from lists of qualified professionals.

Upon receipt of qualifications statements, the Contractor should review and rank each of them to establish the order of preference. The Department recommends that a committee that includes persons with technical skills conduct this review. **The Contractor must also ensure there are no conflicts of interest between those persons involved in reviewing and ranking qualification statements and the firms or individuals being rated.** Family members, relatives, or close friends of submitting proposers should not participate in the review.

Evaluation criteria commonly used include the following:

1. The specialized experience or technical expertise of the firm and its personnel in connection with the types of services to be provided and the complexity of the project;
2. The past record of performance on contracts with the Contractor and other clients, including quality of work, promptness and cost control;
3. The capacity of the firm to perform the work within time limitations, taking into consideration the current and planned workload of the firm;
4. The familiarity of the candidate with the type of problems applicable to the project.

Following the review and ranking of all statements of qualifications, the Contractor should contact the first choice (or the top (3) choices) and initiate an RFP process. The proposals must be written and cover the proposed scope of services, estimated costs, and the type of contract to be provided. Examples of types of contracts:

1. **Cost Reimbursement:** Most appropriate for general assistance contracts and other efforts where the scope and extent of work is not clearly defined. These contracts must establish a cost ceiling and fixed dollar fee for profit;

2. Fixed Price: Most appropriate when the scope and extent of work is clearly defined as in basic services for pre-engineered design, repetitive structures, and typical projects. A maximum price must be stated;
3. Per Diem Contracts: Appropriate only for limited services such as expert testimony or similar work involving intermittent personal services. Costs and profit included in the per diem rate must be shown separately in the firm's or individual's cost proposal;
4. Cost plus a percentage-of-cost contracts are unacceptable and must not be used.

The proposal(s) submitted in response to the RFP must be uniformly reviewed and evaluated, preferably by the committee previously mentioned. When a proposal has been selected, it should be reviewed to ensure that it conforms with all the provisions included in the RFP. If it conforms, the Contractor, or its designated representative, can negotiate a contract.

The contract must include all of the following provisions:

- Effective date of the contract;
- Names and addresses of Contractor and chosen firm;
- Names of representatives of Contractor and firm who will act as liaisons for administration of the contract;
- Specify the authority of the Contractor under which the contract is entered into and the source of funds;
- Specify the extent and character of the work to be performed and time limitations;
- Specify provisions for compensation for services and an overall budget;
- Specify time frame for performance and completion of contract services, including project milestones, if any;
- Specify that termination is possible for non-performance;
- Include the Equal Opportunity requirements discussed in Chapter IX
- Include the Labor Standards requirements in Chapter III.

General Contract Provisions

The Contractor must include the following standard provisions in all HOME-funded agreements.

- a. All contracts in excess of \$10,000 for other than small purchases must contain provisions that describe administrative, contractual, or legal remedies and provide for appropriate sanctions and penalties that apply if Contractors violate contract terms;
- b. All contracts in excess of \$10,000 shall contain provisions for termination including the manner by which termination will be effected and the basis for settlement. In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the Contractor may be terminated because of circumstances beyond the control of the Contractor;
- c. All negotiated contracts (except those of \$10,000 or less) awarded by recipients shall include a provision to the effect that the State, the federal sponsoring agency, the Comptroller General of the United States, or any of their duly authorized representatives, shall have access to any books, documents, papers and records of the Contractor which are directly pertinent to a specific program for the purpose of making audits, examinations, excerpts and transcriptions;
- d. Contracts and subgrants of amounts in excess of \$100,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clear Air Act of 1970 (42 U.S.C. 1857 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.) as amended. Violations shall be reported to the Federal sponsoring agency and the Regional Office of the Environmental Protection Agency.

State Overlay Laws and Regulations

Contractors should be aware of State laws and regulations regarding the procurement process and should seek advice from legal counsel regarding their applicability. The HOME Program does not monitor compliance with State law, except as it applies specifically to the HOME Program. A typical State overlay law applicable to most construction projects is the Department of Industrial Relations', requirement that Prevailing Wage Rates be paid to construction workers on public projects.

Recordkeeping Requirements and Files

Files shall be maintained which are sufficient to track a procurement and to meet the requirements described in the State Standard Agreement, and federal regulations 24 CFR 84 and 24 CFR 85. Minimally, procurement records shall include information concerning the following:

- Description and rationale for the method of procurement;
- Qualification statements, RFPs, and proposals received;

- Rationale for selection of contract type;
- Rationale for contractor selection or rejection;
- The contractor's written cost estimate used to determine cost reasonableness;
- Basis for the cost or price that was awarded;
- A copy of the contract awarded;
- Copies of contract amendments, if any, and the rationale for the amendment;
- A copy of the Notice to Proceed;
- Records of partial payments by the Contractor to the construction contractor and supporting documentation (in financial management files).

Reference Materials

- 24 CFR 84 establishes federal administrative requirements for grants with non-profit organizations receiving HOME funds.
- 24 CFR 85 establishes federal administrative requirements for grants and loans to State Recipients (local government) and any governmental subrecipient receiving HOME funds.
- Federal OMB Circular A-87 establishes principles and standards for determining costs of grants, contracts, and other agreements with State Recipients (local governments) and any governmental subrecipient receiving HOME funds.
- Federal OMB Circular A-122 establishes principles for determining costs of grants, contracts, and other agreements with non-profit organizations.

Additional Web Sites:

<http://www.hud.gov/offices/cpo/index.cfm>